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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2005

JAMES TOLBIRD AND LISA TOLBIRD
Petitioners

v.

ALLISON BELLE WYBLE, TRINITY UNIVERSAL INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND GREAT AMERICAN INSURANCE COMPANY
Respondents

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the failure or refusal to award any compensatory damages to an injured plaintiff for a painful and permanent physical injury resulting in thousands of dollars in past and future medical expenses, past and future lost wages, disability, chronic pain, and a suicide attempt violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioners James Tolbird and Lisa Tolbird are individuals. Respondent Allison Belle Wyble is an individual. Respondent Trinity Universal Insurance Company is an insurance corporation. Respondent United States Fire Insurance Company is an insurance corporation. Respondent Great American Insurance Company is an insurance corporation.

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeal, State of Louisiana, is available at Tolbird v. Wyble, 38,969 (La. App. 2d Cir. 12/15/04), 892 So. 2d 103. The Louisiana Supreme Court denied the writ applications as reported in Tolbird v. Wyble, 05-0444 and 05-0449 (La. 4/29/05), 901 So. 2d 1066, 1067.

STATEMENT OF JURISDICTION

The writ denials of the Louisiana Supreme Court were entered on April 29, 2005. The jurisdiction of this Court is invoked pursuant to 28 USC §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

James Tolbird was seriously injured in an automobile accident in Monroe, Louisiana on May 5, 2001 when he was rear ended by Allison Wyble. He suffered a brachial plexus nerve injury that resulted in chronic pain such that he attempted suicide on one occasion. The case was tried before a jury that found the defendant Wyble 90% at fault for the accident and Mr. Tolbird 10% at fault. The jury awarded the sum of $73,250.66 in past medical expenses, future medical expenses of $10,000.00, future lost wages of $5,000.00 and zero for general damages or the physical and emotional injuries, loss of enjoyment of life and disability.[1]

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[1]Special damages in Louisiana are those damages awarded for medical expenses, lost wages and earning capacity, damage to property, and other

Ms. Wyble was insured by Trinity Universal Insurance Company with liability limits of $50,000 per person. At the time of the accident, James Tolbird was employed by American Meter Service and was insured under the uninsured/underinsured motorist provisions of a liability policy issued by United States Fire Insurance Company. The workmen's compensation carrier, Great American Insurance Company, intervened in the proceedings to recover the sums that it paid under its workmen's compensation policy.

The trial judge granted the plaintiff's Motion for Judgment Notwithstanding the Verdict and found that a zero general or compensatory damage award was clearly legal error and grossly inadequate where there were objective findings of injury, the plaintiff suffered from chronic pain such that he attempted suicide and there was extensive medical treatment and medical expenses. In increasing the award of general or compensatory damages from zero to $120,000.00, the trial judge pointed out that this was the first JNOV that he had ever granted because all of the other jury awards in previous cases had been adequately and fairly rendered.

The defendants appealed to the Louisiana Second Circuit Court of Appeal who reinstated the zero general or compensatory damage award finding that there was nothing in the record to support the trial judge's decision to overturn the jury verdict.[2] As further justification for reversing the trial judge, the appellate court speculated that the jury must have considered the sum of $30,000.00 tendered by the UM

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damages capable of being calculated to a mathematical certainty. General damages are those compensatory damages for physical pain and suffering, mental anguish and distress, loss of the quality of life and disability.

[2] The trial judge gave detailed reasons for his action based on the evidence at pages 1175-1177 of the record of trial which seems to have eluded the appellate court.

carrier prior to trial to be an award of general damages. There was of course no such evidence that this occurred in the record. The question posed and answered by the jury in this case was "What is the total amount of damages suffered by the plaintiff in this case . . . [for] physical pain, suffering, and mental anguish, past, present and future, including permanent disability, *without making any deduction for any reason?"* Thus, when asked to declare the amount of general or compensatory damages suffered (not the amount to be awarded) the jury answered "Zero." Additionally, the jury also determined that the plaintiff was entitled to "Zero" special damages for lost wages but the appellate court found that plaintiff had suffered in excess of $46,000 in lost wages and reversed the jury award. The special damages ultimately awarded by the appellate court exceeded $100,000.00. The tender of $30,000.00 was less than one-third of the special damages awarded in this case.

Subsequently, in Green v. K-Mart Corporation, 03-2495 (La. 5/25/04), 874 So. 2d 838, 843, the Louisiana Supreme Court clearly held that it was impermissible to fail to award any general or compensatory damages where the plaintiff suffered injuries from the accident, incurred medical expenses for treatment of those injuries and will require future medical treatment of those injuries. Specifically, the Court in Green, supra, set forth the constitutional standard in the following language:

> "Here the Court of Appeal correctly determined that the jury abused its discretion in failing to award general damages while awarding a substantial amount for past and future medical expenses. In this case, the jury determined that plaintiff suffered injuries casually related to the accident which required medical attention, and is still suffering an injury, that will, in fact, require medical attention in

the future. *Failure to make a general damage award in such circumstances was an abuse of discretion."* (Emphasis Added).

Inexplicably, plaintiff's writ application for review to the Louisiana Supreme Court was denied without explanation. See Tolbird v. Wyble, 05-0444 and 05-0449, (La. 4/29/05), 901 So. 2d 1066, 1067.

ARGUMENT

In our federal system, states have considerable flexibility in determining the level of compensatory and punitive damages that may be awarded in any particular case or classes of cases. BMW of North America, Inc. v. Gore, 517 U. S. 559, 116 S. Ct. 1589 (1996); TXO Production Corporation v. Alliance Resources Corporation, 509 U. S. 443, 113 S. Ct. 1589 (1993). In tort cases, the more serious the physical injuries, common sense and fundamental fairness dictate the greater the award of compensatory damages for pain and suffering, mental anguish and distress, loss of the quality of life, and disability. Louisiana, like the other states, provides compensatory damages to those persons who have been physically injured by another's negligence.[3] Louisiana tort law is grounded upon Article 2315 of the Louisiana Civil Code which provides:

"Any act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

This principle of fundamental fairness was embodied in Louisiana law as Article 2294 of the Louisiana Civil Code

[3]Louisiana is one of the few states that does not allow punitive damages for corporate fraud or to punish outrageous conduct that is willful, intentional or grossly negligent and injures someone. Punitive damages are available in Louisiana to a motorist who has been injured by a drunk driver as provided for in Article 2315.4 of the Louisiana Civil Code.

of 1825. It has survived intact throughout the years and stands for the principle that persons injured through another's negligence are entitled to be fairly and adequately compensated for those injuries. Louisiana courts have implicitly acknowledged that awards for personal injuries that are either grossly excessive or grossly inadequate violate the due process clauses of the Louisiana and United States Constitutions and cannot stand. Coco v. Winston Industries, Inc., 341 So. 2d 343 (La. 1977); Youn v. Maritime Overseas Corporation, 623 So. 2d 1227 (La. 1993), writ denied 510 U. S. 1114, 114 S. Ct. 1257 (La. 1993); Henry v. Williams, 39,318 (La. App. 2d Cir. 1/26/05), 892 So. 2d 865, writ denied 05-0472 (La. 4/22/05), 899 So. 2d 576.

Louisiana has set up through Article 2315 of the Louisiana Civil Code and the jurisprudence, most recently the Green case, particularized standards requiring the courts of this state to award compensatory and general damages based on objective and defined criteria. Specifically, where the trier of fact determines that the plaintiff has suffered injuries causally related to the accident and received medical treatment for those injuries, then it is mandatory to award general or compensatory damages for those injuries. Green v. K-Mart Corporation, supra. Persons injured in Louisiana through the wrongful conduct of another have a constitutionally protected interest to be fairly and adequately compensated through compensatory or general damages for those injuries. The use of "explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [constitutionally protected] interest." Kentucky Department of Corrections v. Thompson, 490 U. S. 454, 463, 109 S. Ct. 1904 (1999). See also Logan v. Zimmerman Brush Company, 455 U. S. 428, 102 S. Ct. 1148 (1982).

While this Honorable Court has never articulated a constitutional due process standard for review of general or compensatory damage awards in tort cases, the federal circuit courts in reviewing and setting aside jury awards as either excessive or inadequate have used the terms "grossly excessive," "abuse of discretion," "shocking to the judicial consciences," "inadequate," "outrageously excessive," and many others. Grunenthal v. Long Island Railroad Company, 393 U. S. 156, 89 S. Ct. 331 (1968). Recently, this Honorable Court in State Farm Mutual Automobile Insurance Company v. Campbell, 538 U. S. 408, 123 S. Ct. 1513 (2003) set forth the principal that an excessive punitive damage award violates the Due Process Clause of the Fourteenth Amendment and "violates the elementary notions of fairness enshrined in constitutional jurisprudence." Likewise, the failure to award any compensatory or general damages for physical pain and suffering, mental anguish and distress, loss of the quality of life and permanent disability proven by the evidence and found by the trier of fact violates the basic and elementary notions of fairness embodied in our legal system. Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U. S. 424, 121 S. Ct. 1678 (2001). The refusal to award any general or compensatory damages "shocks the conscience" and violates the Due Process Clause of the Fourteenth Amendment.

It is respectfully submitted that the issue of the adequacy of damages awarded to individuals injured and maimed through the negligence of others is certainly as important, if not more so, than the issue of the excessiveness of punitive damage awards against corporate defendants who have engaged in fraud, lies, misrepresentations, and artifices and other dubious business practices. The constitutional protections afforded individuals injured through negligence or willful conduct need to be addressed by this Honorable